Formal Judgment and Reasons for Judgment

of the Supreme Court of Canada

in the matter of

THE RESTORATION OF THE CROWSNEST PASS RATES

and the General Order of the Railway Board disallowing the tariffs of the Canadian Pacific and the Canadian National Railway Companies

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THE CROWSNEST PASS RATES

THE RESTORATION OF

Former Judgment and Reasons for Judgment

of the Supreme Court of Canada

CROWSNEST PASS AGREEMENT

JUDGMENT OF THE SUPREME COURT OF CANADA

In the matter of various complaints against certain tariffs of the Canadian Pacific and the Canadian National Railway Companies, arising out of the restoration of the Crowsnest Pass Rates, so-called.

And in the matter of the General Order of the Board No. 408, dated October 14, 1924, disallowing such tariffs, and the application for leave to appeal to the Supreme Court of Canada.

Leave granted to appeal upon the following questions:—

Question 1: Whether, as a matter of law, the Board is empowered, under the jurisdiction conferred upon it by the Railway Act, or otherwise, to authorize railway rates upon the railway of the Canadian Pacific Railway Company in excess of the maximum rates referred to in the Crowsnest Pass Act, being chapter 5, 60-61 Victoria, Statutes of Canada, and in the agreement therein referred to, upon the commodities therein mentioned.

Answer 1: No.

Question 2: If the court shall be of the opinion that the Crowsnest Pass Act or agreement is binding upon the Board of Railway Commissioners for Canada, then, according to the construction of the Crowsnest Pass Act, section 1, clause (*d*), and the agreement made thereunder.

(*a*) I. Are the rates therein provided applicable to traffic westbound from Fort William and from all points east of Fort William now on the Canadian Pacific Railway Company's railway?

Answer: No.

(*a*) II. Are such rates confined to westbound traffic originating at Fort William and at such points east of Fort William as were, at the date of the passing of the Act and (or) the making of the agreement, on the company's line of railway?

Answer: Yes.

(*b*) Are such rates applicable to traffic originating at points east of Fort William which were, at the date of the passing of the Act and (or) of the making of the agreement, on any line of railway owned or leased by or operated on account of the Canadian Pacific Railway Company?

Answer: In order that the traffic provided for by clause (*d*) should fall under that clause it must originate at Fort William or some point east thereof which at the date of the agreement was "on the company's railway."

(*c*) Are the rates therein provided applicable to traffic destined to points west of Fort William which are now on the Canadian Pacific Railway Company's railway, or on any line of railway owned or leased by or operated on account of the Canadian Pacific Railway Company?

Answer: In order that the rates prescribed in clause (*d*) should apply the destination of traffic otherwise within that clause must be a point which was,

at the date of the agreement, "on the company's main line or on (some) line of railway throughout Canada owned or leased by or operated on account of the company."

(*d*) Are such rates confined to traffic destined to points west of Fort William which were, at the date of the passing of the Act or the making of the agreement, on the Canadian Pacific Railway Company's railway, or on any line of railway owned or leased by or operated on account of the Canadian Pacific Railway Company?

Answer: Yes.

Question 3: Whether, as a matter of law, the Board is empowered, under the jurisdiction conferred upon it by the Railway Act, or otherwise, to authorize rates upon the Canadian Pacific Railway on grain and flour from all points on the main line, branches, or connections of the company west of Fort William, to Fort William and Port Arthur, and all points east, beyond the maximum rates specified in the Crowsnest Pass Act and Agreement, and referred to in chapter 41, Statutes of Canada (1922).

Answer to 3: No.

IN THE SUPREME COURT OF CANADA

February 26, 1925.

JUDGMENTS

1. *In re Crowsnest Pass Rates.*

As to Questions Nos. 1 and 3: Appeal allowed. The maximum rates provided by clauses (*d*) and (*e*) (s. 1, Crowsnest Pass Act, 60-61 V, c. 5) are declared binding on the Board of Railway Commissioners for Canada.

As to Question No. 2: Appeal dismissed. The application of the maximum rates provided in clauses (*d*) is declared to be restricted to westbound traffic in the commodities specified originating from Fort William or some point east thereof which was, on the 6th of September, 1897, on the company's railway and destined for some point west of Fort William which was, on the 6th of September, 1897, on the company's main line or on any line of railway throughout Canada owned or leased by or operated on account of the company.

Mr. Justice Idington dissents in regard to Question No. 2 for reasons stated by him in writing.

In view of the divided success, there will be no costs in the appeal.

2. *Mid-West Collieries Ltd v. McEwan.*

Appeal dismissed with costs.

3. *Scottish Union and National Insurance Co. v. Lord et al.*

Appeal dismissed with costs.

IN THE SUPREME COURT OF CANADA

In Appeal from the Board of Railway Commissioners for Canada

In the Matter of various complaints against certain tariffs of the Canadian Pacific and the Canadian National Railway Companies arising out of the restoration of the Crowsnest Pass Rates, so-called; and in the matter of a General Order of the Board No. 408, made by the Board of Railway Commissioners for Canada, dated October 14, 1924,

Between the Governments of the Provinces of Alberta, Saskatchewan, and Manitoba (Appellants), and The Canadian Pacific Railway Company (Respondents).

REASONS FOR JUDGMENT

The Chief Justice:

By the contract for the construction of the Crowsnest Pass Railway, made in 1897, the Canadian Pacific Railway Company covenanted and agreed with Her Majesty, represented by the Minister of Railways and Canals, *inter alia,*

(*d*) That a reduction shall be made in the general rates and tolls of the company as now charged, or as contained in its present freight tariff, whichever rates are the lowest, for carloads or otherwise, upon the classes of merchandise hereinafter mentioned, westbound, from and including Fort William and all points east of Fort William on the company's railway to all points west of Fort William on the company's main line, or on any line of railway throughout Canada owned or leased by or operated on account of the company, whether the shipment is by all rail line or by lake and rail, such reduction to be to the extent of the following percentages respectively, namely:

Upon all green and fresh fruits, 33⅓ per cent, coal oil, 20 per cent; cordage and binder twine, 10 per cent; agricultural implements of all kinds, set up or in parts, 10 per cent; iron, including bar, band, Canada plates, galvanized, sheet, pipe, pipe-fittings, nails, spikes, and horse-shoes, 10 per cent; all kinds of wire, 10 per cent; window glass, 10 per cent; paper for building and roofing purposes, 10 per cent; roofing felt, box and packing, 10 per cent; paints of all kinds and oils, 10 per cent; live stock, 10 per cent; wooden ware, 10 per cent; household furniture, 10 per cent;

And that no higher rates than such reduced rates or tolls shall be hereafter charged by the company upon any such merchandise carried by the company between the points aforesaid; such reduction to take effect on or before the first of January, one thousand eight hundred and ninety-eight;

(*e*) That there shall be a reduction in the company's present rates and tolls on grain and flour from all points on its main line, branches, or connections, west of Fort William to Fort William and Port Arthur, and all points east, of three cents per one hundred pounds, to take effect in the following manner: One and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-eight, and an additional one and one-half cent per one hundred pounds on or before the first day of September, one thousand eight hundred and ninety-nine; and that no higher rates than such reduced rates or tolls shall be charged after the dates mentioned on such merchandise from the points aforesaid.

The execution of the agreement containing these and other essential provisions by the company in terms prescribed therein was by the statute 60 and 61 Victoria, chapter 5, made the condition of an undertaking to grant a subsidy; and by section 2 of the statute it was enacted:—

2. The company shall be bound to carry out in all respects the said agreement, and may do whatever is necessary for that purpose.

Tariffs in conformity with these rates were filed and maintained without serious complaint until 1917, when, owing to enormous increases in operating expenses occasioned by conditions arising out of the war, very substantial advances in railway freight rates were found to be inevitable. These were provided for chiefly by Orders in Council passed under the War Measures Act during 1917 and 1918, which disregarded all restrictions upon rates imposed by such special Acts and agreements as those with which we are now concerned. When the Railway Act was consolidated in 1919 these emergency Orders in Council were about to expire. Apparently it was felt that costs of operation were still too great to permit of a return to normal conditions. To provide for the interval until such a return might prove feasible, the following provision was then introduced into the Railway Act as subsection 5 of section 325:—

5. Notwithstanding the provisions of section three the powers given to the Board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charge of unjust discrimination whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company: Provided that this subsection shall remain in force only during the period of three years from and after the date of the passing of this Act.

A further substantial increase in rates was made by the Board of Railway Commissioners in 1920 under the authority of this subsection; and a revision of rates in many important particulars was effected in 1922 after an exhaustive inquiry made by the Board with the purpose of acquiring the information necessary to enable it to fix fair and reasonable freight rates.

The temporary character of subsection 5 of section 325 is patent. When it was about to expire Parliament extended its operation by chapter 41 of the Statutes of 1922, which reads as follows:—

> 1. Subsection five of section three hundred and twenty-five of the Railway Act, 1919, shall, notwithstanding the proviso thereof, remain in effect until the sixth day of July, 1923, and may be continued in force for a further period of one year by order of the Governor in Council published in the *Canada Gazette;* Provided that notwithstanding anything herein or in said subsection five contained, rates on grain and flour shall, on and from the sixth day of July, 1922, be governed by the provisions of the agreement made pursuant to chapter 5 of the statutes of Canada, 1897.

Continuance for the further period of one year by Order in Council ensued. Further extension by legislation was sought, but ineffectually, and the operation of subsection 5 of section 325 came to an end on the 6th of July, 1924.

In anticipation of this occurrence, the railway companies, apparently under the conviction that the rates fixed by clauses (*d*) and (*e*) of the Crowesnest Pass Agreement would become again operative, had filed tariffs in conformity therewith effective on the 7th of July—the Canadian Pacific Railway presumably in fulfilment of its obligation, statutory or contractual, and the Canadian National Railway under the practical compulsion of meeting Canadian Pacific rates at competing points. The tariffs so filed by the Canadian Pacific Railway Company applied only to points which had been upon its system in 1897. Complaints of discrimination and unfair treatment from many points to which the system had been subsequently extended immediately began to pour into the Board's offices. The position taken by the complainants was that the Crowsnest rates should be extended to all points within the designated areas touched by the Canadian Pacific Railway system as it now exists either because the agreement of 1897 should itself be interpreted as so providing, or because the anti-discriminatory sections of the Railway Act require the Board so to apply them. Hearing of these complaints took place in September. The railway companies then took the stand that the Crowsnest rates were no longer binding upon the Board because so to regard them would be inconsistent with the scheme of rate control inaugurated by the Railway Act, 1903, and with the powers by that Act and the Railway Act, 1919, committed to the Board. For the Canadian National Railway it was further pointed out that the maintenance of the Crowsnest rates indirectly, but most effectively, subjected that railway, although it was not a party to the agreement and was not intended to be bound or affected by it, to unfair and unjustifiable rates since it must either accept the Canadian Pacific Railway's reduced rates to and from points where it competes with that railway or entirely forgo traffic of all classes to which they apply.

On the 14th of October a majority of the Board (McKeown, C.C., Nantel, D.C.C., Boyce, C., and Lawrence, C.), McLean, A.C.C., and Oliver, C., dissenting, held that the rates stipulated in the Crowsnest Pass Act and Agreement were not binding upon the Board. In their opinion the Crowsnest Pass Act was not a "Special Act" within subsection 2 (28 and 3 of the Railway Act, 1919; if it were such a "Special Act" it did not relate to the same subject-matter as the general Railway Act; its application was excluded because the sections in the Railway Act, 1919, respecting tolls (314 *et seq.*) have "other-

wise provided" within the meaning of section 3 of that statute; the Crowsnest rates should be regarded as fixed by agreement and not by statute; and that agreement does not bind the Board (Regina Rates Case, 45 Can. S.C.R. 321) and must not be allowed indirectly to control rates on competitive lines of a railway not a party to it. The order of the Board accordingly disallowed, and directed the withdrawal within fifteen days of the tariffs re-establishing Crowsnest Pass rates.

Holding these views the majority of the Board found it unnecessary to deal with the contention of the present appellants and other complainants that the operation of the Crowsnest Pass rates should be extended to all points now on the Canadian Pacific Railway Company's system and also to all points on the Canadian National Railway which might, under the clauses of the Railway Act which provided against discrimination between different localities, be deemed entitled to the benefit of them. Mr. Assistant Chief Commissioner McLean in his dissenting opinion also refrained from passing upon this contention of the appellants, contenting himself with expressing in clear and forceful terms his reasons for dissenting from the Board's decision upholding the contention of the railway companies. Mr. Commissioner Oliver, however, expressed with much vigour his views that:—

"(1) The Crowsnest Act applies to all lines and connections of the Canadian Pacific Railway in Canada, and, therefore, the rates as defined by that Act should be applied forthwith throughout the Canadian Pacific system.

"(2) In pursuance of the powers vested in this Board to prevent discrimination in railway rates and services, the rates defined by the Crowsnest Act should be applied to the Canadian National system and to all other railway lines in Canada."

Exercising the power conferred by subsection 3 of section 52 of the Railway Act, 1919, the Board of Railway Commissioners by order of the 10th of December, 1924, granted leave to the Governments of the Provinces of Alberta, Saskatchewan and Manitoba to appeal to this court from its order of the 14th of October. By Order in Council, dated the 25th of December, 1924 (P.C. No. 2220), the operation of the Board's order of the 14th of October was suspended until the decision of the appeal.

Section 52 (3) requires parties seeking leave to appeal to state the grounds on which it is proposed to appeal, and, as is customary, the Board in its order granting leave formulated the "questions of law and jurisdiction" to be presented for the consideration of the court. They are as follows:—

1. Whether, as a matter of law, the Board is empowered, under the jurisdiction conferred upon it by the Railway Act, or otherwise, to authorize railway rates upon the railway of the Canadian Pacific Railway Company in excess of the maximum rates referred to in the Crowsnest Pass Act, being chapter 5, 60-61 Victoria, Statutes of Canada, and in the agreement therein referred to, upon the commodities therein mentioned.
2. If the court shall be of the opinion that the Crowsnest Pass Act or Agreement is binding upon the Board of Railway Commissioners for Canada, then, according to the construction of the Crowsnest Pass Act, section 1, clause (*d*), and the agreement made thereunder,—
   (*a*) Are the rates therein provided applicable to traffic westbound from Fort William and from all points east of Fort William now on the Canadian Pacific Railway Company's railway; or, are such rates confined to westbound traffic originating at Fort William and at such points east of Fort William as were, at the date of the passing of the Act and (or) the making of the agreement, on the company's line of railway?

(*b*) Are such rates applicable to traffic originating at points east of Fort William which were, at the date of the passing of the Act and (or) of the making of the agreement, on any line of railway owned or leased or operated on account of the Canadian Pacific Railway Company?

(*c*) Are the rates therein provided applicable to traffic destined to points west of Fort William which are now on the Canadian Pacific Company's railway, or on any line of railway owned or leased or operated on account of the Canadian Pacific Railway Company? or

(*d*) Are such rates confined to traffic destined to points west of Fort William which were, at the date of the passing of the Act or the making of the agreement, on the Canadian Pacific Railway Company's railway, or on any line of railway owned or leased by or operated on account of the Canadian Pacific Railway Company?

3. Whether, as a matter of law, the Board is empowered, under the jurisdiction conferred upon it by the Railway Act, or otherwise, to authorize rates upon the Canadian Pacific Railway on grain and flour from all points on the main line, branches, or connections of the company west of Fort William, to Fort William and Port Arthur, and all points east, beyond the maximum rates specified in the Crowsnest Pass Act and Agreement, and referred to in chapter 41, Statutes of Canada (1922).

In substance two questions are submitted:—

1. Is the Board entitled to authorize rates upon the Canadian Pacific Railway Company in excess of those provided for in the Crowsnest Pass Subsidy Act and Agreement?

2. If not, is the application of the rates so provided for confined to traffic in the specified commodities between points on the Canadian Pacific Railway Company's lines as they existed at the date of the said Act and Agreement to the exclusion of traffic originating at or destined for points to which that company's lines have been subsequently extended?

When the Canadian Pacific Railway Company was incorporated and its charter granted in 1881, the Consolidated Railway Act, 1879 (c. 9), was in force. By that Act, subject to provisions against discrimination, the power to fix tolls was vested in the railway company or its directors (s. 17). While such tolls were subject to approval by the Governor in Council, Parliament was empowered to reduce them only with the consent of the company and subject to the restriction that when so reduced they should produce not less than 15 per cent per annum profit on the capital actually expended in the construction of the railway (s.s. 11). It would seem not unlikely that the exercise of the right of revision by the Governor in Council was by implication subject to a corresponding restriction. In so far as applicable and not inconsistent therewith the Consolidated Railway Act, 1879, was incorporated with the Canadian Pacific Railway Company's charter by the statute 44 Victoria, chapter 1. The stipulation in section 20 of that charter that the right of Parliament under the general Railway Act to reduce the company's tolls should be "extended" so that the profits of the company might be restricted to 10 per cent on the capital actually expended on the construction of the railway, with a corresponding limitation of the controlling power of the Governor in Council, was, perhaps, regarded as a concession in the public interest. But, however that may have been, the honour of the Parliament of Canada was thus pledged to non-interference with the tolls of the Canadian Pacific Railway Company so long as the net profit on capital actually expended by it for construction should not exceed 10 per cent.

When the Railway Act was revised in 1888 (c. 29), while subsection 11 of section 17 of the Railway Act, 1879, purporting to restrict the right of Parliament to reduce tolls disappeared, rights conferred by special Acts, such as that of the Canadian Pacific Railway in regard to freedom within specified limits from control of its tolls, were preserved (ss. 3-6).

This was the situation when the Crowsnest Pass Railway project came before Parliament in 1897 and it was asked to provide a subsidy for the construction of that railway by the Canadian Pacific Railway Company. Apparently the Government of the day thought the occasion opportune to secure, in the public interest, greater control over Canadian Pacific Railway tolls than Parliament had stipulated in 1881. It accordingly enacted the stature 60-61 Victoria, chapter 5, whereby it appropriated a subsidy for the construction of the projected railway, provided the Canadian Pacific Railway Company should enter into an agreement containing, *inter alia*, the covenants as to rates above quoted, around which the present controversy centres. The statute sets out *in extenso* nine undertakings ((*a*)—(*i*)) to be given by the company and they were embodied *verbatim* in the agreement executed between Her Majesty, represented by the Minister of Railways and Canals, and the Canadian Pacific Railway Company on the 6th of September, 1897.

Clauses (*a*) and (*b*) are covenants for the construction and operation of the Crowsnest Pass Railway.

By clause (*c*) all local tolls on the new railway itself and certain connecting lines and other lines in southern British Columbia and all tolls on traffic on the entire Canadian Pacific Railway system originating from or destined for any point on the new railway or on such connecting lines and lines in British Columbia were made subject to revision and control by the Governor in Council, or by a Railway Commission when established.

By clauses (*d*) and (*e*), above quoted, maximum rates for certain commodities moving in stated directions and between designated points were provided and it is covenanted that no higher rates shall be charged for such traffic after the dates specified. There is no reservation of any power of revision or control in regard to these maxima.

By clause (*f*) the granting of running powers is reserved to the Railway Committee of the Privy Council.

By clause (*g*) the new line and the specified connecting lines in British Columbia and the line between Dunmore and Lethbridge are made subject without restriction to the operation of the general Railway Act.

By clause (*h*) the disposition of any provincial land subsidy is made subject to regulation by the Governor in Council.

By clause (*i*) the company is required to surrender to the Dominion Government 50 per cent of any coal-bearing lands it may obtain from the Government of British Columbia to be dealt with on conditions to be prescribed by the Governor in Council.

It is noteworthy that in all these clauses, except (*d*) and (*e*), there is a reservation of control by the executive government of Canada or by a body nominated by Parliament to exercise it. The contrast between clause (*c*) and clauses (*d*) and (*e*) is most striking and significant. All three deal with traffic rates; in clause (*c*) complete control and power of revision is stipulated for; in (*d*) and (*e*) there is an absolute and final fixing of certain maximum rates. It should also be remembered that, as indicated in clause (*c*), Parliament had before it the probability of the establishment of a Railway Commission. Nevertheless—as we must assume deliberately—it abstained from reserving to that body, or to its then existing predecessor, any control over the maximum rates fixed by clauses (*d*) and (*e*). The main question now before us is whether Parliament by its subsequent general railway legislation, including the creation of the Board of Railway Commissioners and the vesting in it of very broad

powers of supervision and control over tolls and rates, as was undoubtedly competent to it—and to it alone—has relieved the Canadian Pacific Railway Company from the operation of clauses (*d*) and (*e*) of the Crowsnest Pass Agreement, abrogating the maxima they prescribed so far as required to give to its delegate, the Board, unrestricted control of rates in respect to the traffic covered by them.

On behalf of the respondent railway companies it was strongly urged at bar that the stipulations as to rates in clauses (*d*) and (*e*) are merely covenants in an agreement and, as such, not binding on the Board of Railway Commissioners. But the terms on which Parliament was prepared to grant the subsidy for the Crowsnest Pass Railway involved an interference with a privilege in regard to tolls conceded to the Canadian Pacific Railway Company in 1881, which, while not legally binding on Parliament, it no doubt deemed itself in honour obliged to respect. Hence, in all probability, the form adopted of offering the subsidy conditionally upon the railway company agreeing to a modification of that privilege —not, however, in terms to be agreed upon, but in definite and precise terms formulated by Parliament itself in the statute providing for the subsidy. Parliament in effect said: if you, the Canadian Pacific Railway Company, will assent to the proposed modification of a provision of your statutory contract of 1881 and will forgo *pro tanto* the control of rates which it gives you, we will grant you a subsidy on accepting which you will become bound to carry out the terms on which it is granted. That was, in substance and effect, granting a subsidy and imposing by statute the terms on which it was granted. In so far as the arrangement was contractual, while the contract is formally made with Her Majesty in Her Executive capacity, it was in reality made with Parliament itself. It alone could grant the subsidy. It represented the people of Canada. Parliament speaks by statute. By statute it authorized the contract. It cannot make the slighest difference whether the statute, passed before the contract was in fact executed, authorized it, prescribed its very terms and declared that when made it should be binding; or, the contract having been already formally executed, the statute ratified and confirmed it and declared its terms binding as if enacted as part of the statute itself. A refinement which, while admitting that the terms would in the latter case be of statutory obligation, would treat them in the former as merely contractual in their nature and effect, does not commend itself either as sound in law or as consistent with common sense.

But, it is said, although the Crowsnest Pass rates should be regarded as imposed by statute, and as such binding in 1897, and subject to be interfered with only by Parliament, they lost that status under the Railway Act, 1903, and then became subject to the control of the Board of Railway Commissioners by that Act created. That, it is argued, was the effect of the scheme of rate control there adopted and of the wide powers for carrying it out conferred on the new Board.

On the other hand, it is asserted for the appellants that, as provisions of a special Act relating to the subject-matter of tolls, the stipulations in question came within subsections 3 and 5 of the Railway Act, 1903, and accordingly overrode its provisions so far as was necessary to give effect to them. Clause (*w*) of section 2, section 3 and the concluding clause of section 5 of the Railway Act, 1903, are as follows:—

> 2. (*w*) The expression "Special Act" means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, and includes all such Acts; and where such authority is derived from letters patent granted under any Act, such letters patent shall be deemed to form part of such Act.

> 3. This Act shall apply to all persons, companies and railways (other than Government railways) within the legislative authority of the Parliament of Canada, and shall be incorporated and construed, as one Act, with the Special Act, subject as herein provided.
> 5. . . . ., unless otherwise expressly provided in this Act, where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the Special Act shall be taken to override the provisions of this Act in so far as is necessary to give effect to such Special Act.

Almost every word of these several provisions was the subject of exhaustive argument and criticism before us, which it is quite impossible to review without writing at inordinate length.

The Crowsnest Pass Act is unquestionably "enacted with special reference to the Canadian Pacific Railway" and, therefore, comes within clause (*w*) of section 2 and is a "Special Act" within the meaning of that term as used in subsections 3 and 5. The suggestion that to bring it within the definition it must also be an Act conferring "authority to construct or operate a railway" involves an unjustifiable substitution of "and" for "or." That the conclusion of the majority of the Board that the Crowsnest Pass rates were not imposed by a "Special Act" rests largely upon such a change in the text being made is apparent from the treatment accorded the corresponding section of the Railway Act, 1888, section 2 (*t*) by the learned Commissioner who wrote the principal judgment delivered by the Board (Judgments, etc., Board of Railway Commissioners for Canada, Vol. XIV, at p. 164) and whose conclusions as to the legal aspect of the case the learned Chief Commissioner unreservedly adopts, with the concurrence of Messrs. Commissioners Nantel and Lawrence.

Apart entirely from the ordinary rule of construction "*generalia specialibus non derogant*" and the provisions of section 3, in the application of which that principle must govern, we have the explicit saving language of section 5: "unless otherwise expressly provided in this Act, etc."

We regard it as incontrovertible that the subject-matter of clauses (*d*) and (*e*) of section 1 of the Crowsnest Pass Act and the subject-matter of the sections of the Railway Act, 1903, which confer jurisdiction on the Board in regard to tolls, are the same in the sense required by section 5. The former deals with tolls on the Canadian Pacific Railway alone, as is to be expected in a Special Act; the latter with tolls on Dominion railways generally, which, of course, include the Canadian Pacific Railway.

Counsel for the railway companies pressed the contention that the provisions of subsection 4 of section 251 of the Railway Act, 1903, forbidding the taking of tolls by any railway company "except under the provisions of *this* Act" and other similar provisions—especially when contrasted with other sections in which we find such language as "subject to the provisions in this and the Special Act contained" (section 111)—clearly evince an intention to exclude the application of any provision of any special Act inconsistent with giving to them the widest and most comprehensive operation and effect. But, at the most, they amount to a "providing otherwise" by implication, whereas section 5 declares that the provisions of the special Act must prevail "unless otherwise *expressly* provided in this Act." When Parliament intended to exclude the application of the Special Act in favour of the general Act of 1903, it said so in unmistakable terms, as, for instance, in section 52 and in subsection 8 of section 175. There is certainly nothing in the Railway Act, 1903, which *expressly* provides that the rate stipulations of the Crowsnest Pass Act shall not override, but, on the contrary, shall be subject to the several provisions conferring control of rates on the Board of Railway Commissioners. The same observations apply to arguments founded on the inconsistency of the Crowsnest Pass rate pro-

visions with the scheme of the Railway Act, 1903, to prevent inequalities and discrimination, and on the fact that to maintain those rates involves subjecting other railway companies not parties to the Crowsnest Pass Agreement to corresponding rate restrictions at competitive points. Nothing short of an express provision abrogating or overriding clauses (*d*) and (*e*) of section 1 of the Crowsnest Pass Act would justify subordinating them to any general provisions of the Railway Act, 1903. Parliament has explicitly so enacted.

Since, then, we have in the Crowsnest Pass Railway Act of 1897 a statute which was enacted with special reference to the Canadian Pacific Railway and which relates to the same subject-matter as the toll sections of the Railway Act, 1903, and the latter Act does not expressly otherwise provide, it follows that anything in the provisions of the Railway Act, 1903, which is inconsistent with those of such Special Act is thereby over-ridden so far as may be necessary to give effect to the Special Act.

That this is not merely the intention expressed in subsection 3 and 5 of the Railway Act, 1903, but that it was the actual purpose of Parliament becomes practically certain when we take into consideration two pieces of legislation in *pari materia* referred to by counsel for the appellants and the subsequent legislation of 1919 and 1922 temporarily suspending all statutory restrictions on the rate controlling powers of the Board.

In 1903, the very year in which it constituted the Railway Board and passed the general Railway Act defining its powers, Parliament enacted another railway subsidy Act (c. 7) which contains this provision:—

> 6. The rates and tolls to be charged for the transfer and carriage of freight and passengers upon the lines of railway so aided and upon all lines owned by the Canadian Northern Railway Company shall be under the control of the Governor in Council, or of such authority, commission or tribunal as is designated or constituted under any Act of the Parliament of Canada for the regulation or control of the business of railways; provided that the rates or tolls to be charged shall not in any case be higher than the rates or tolls which may be fixed in the contract to be made between the Government of Canada and the Canadian Northern Railway Company under this Act.

Yet we are asked to hold that at the same session the proviso to this section so obviously designed to prevent the Board, then about to be born, authorizing rates in excess of maxima to be fixed by contract between the Government and the Railway Company was rendered nugatory by the very generality of the control over rates vested in the new Board by the Railway Act, 1903.

Again in 1908, by section 6 of chapter 11—another railway subsidy Act—passed five years after the Railway Act, 1903, had come into force, Parliament enacted that:—

> The rates and tolls charged by the company upon any of its lines shall not in any case be higher than the rates or tolls fixed in the contract to be made between the Government of Canada and the Railway Company under this Act—

another piece of inconsistent legislation if it was meant that the Board should possess the over-riding powers for which the respondents now contend.

Could more convincing evidence be found that, notwithstanding the wide character of the control over rates vested in the Board of Railway Commissioners, its powers were not meant to extend to the authorization of tolls in excess of maxima which Parliament had seen, or should see, fit to fix by Special Acts—that, as stated in section 5 of the Railway Act, 1903, such provisions of Special Acts were meant to over-ride the general provisions of the Railway Act, unless otherwise *expressly* provided?

A series of opinions expressed by successive chairmen of the Board—Hon. A. C. Killam, Sir Henry Drayton and Hon. F. B. Carvell—recognizing the Crowsnest Pass rates as binding, followed by action based thereon, is likewise not devoid of weight and significance. The legislation of 1919 (chapter 68, section 325 (5)) and that of 1922 (chapter 41) form important incidents in the history of railway rate legislation in Canada. These enactments seem to indicate with very great probability that in the view of Parliament the provisions of Special Acts fixing maximum rates had not been superseded by the rate control powers conferred on the Board of Railway Commissioners—a circumstance which, notwithstanding the tenor of section 21 of the Interpretation Act, may not be wholly disregarded. When all the circumstances are taken into account the case in favour of the appellants' contention that, upon the suspension effected by subsection 5 of section 325 of the Railway Act, 1919, expiring in July, 1924, the rates clauses of the Crowsnest Pass Special Act immediately revived and were in their pristine force and vigour binding on the Board of Railway Commissioners, with the result that it was without jurisdiction to pronounce its order of the 14th of October, seems to us to be incontrovertibly established.

Before leaving this branch of the case, lest it be thought it had been overlooked, section 3 of the Railway Act, 1919, should be noticed. In the revision of 1906 subsection 3 and 5 of the Railway Act, 1903, were recast and combined. In their new form they became section 3 of the Railway Act (c. 37, R.S.C. 1906). The phrase "unless otherwise expressly provided" was retained intact and applied only to the provision of section 5 of the Act of 1903 carried into section 3 of the Revised Statute. In 1919 the word "expressly" is dropped and the phrase "except as in this Act otherwise provided," with which it opens, is made applicable to the entire section, including the clause (*a*) taken from section 3 of the Act of 1903, replacing as to it the words "subject as herein provided" found in the Act of 1903 and the words "subject to the provisions thereof" (*i.e.* of this Act) found in section 3 of chapter 37 of the Revised Statutes, 1906. While it may be that in the change made in 1919 clarity and certainty are to some extent sacrificed to a desire for brevity, it would, we think, be extravagant to attribute to Parliament, merely because of the omission under such circumstances of the word "expressly," the intention of thereby effectuating such an important and far reaching change in its legislative policy as would be involved in clothing the Board of Railway Commissioners with jurisdiction to disregard and over-ride maximum rates prescribed by Special Acts such as those of 1897, 1903, and 1908, to which attention has been drawn.

In holding the statutory maximum rates fixed by clauses (*d*) and (*e*) of the Crowsnest Pass Agreement to be binding on the Board of Railway Commissioners we do not, as the learned Chief Commissioner apprehended (Case p. 45), view that agreement as "forever disabling the parties thereto from reconsidering their situation . . . . . or readjusting their relations". On the contrary, Parliament, which was in reality one of the contracting parties, stipulating the terms on which it would grant the subsidy may to-morrow reconsider and readjust those terms and relieve the other contracting party from the obligations it incurred; and it is not to be supposed that Parliament would hesitate to exercise its powers for the correction or amendment of legislation which is found to operate prejudicially to the public interest. But Parliament alone can do this. Having made the obligations statutory, it must change or amend them by statute.

We now pass to the consideration of the second question—Do the Crowsnest Pass rates apply exclusively to the designated traffic between points which were on the Canadian Pacific Railway Company's lines in 1897? The terms in which the rate reduction clauses (*d*) and (*e*) were couched seem to afford

a conclusive answer in the affirmative. Both clauses provide for a reduction in then existing rates and tolls—clause (*d*) by deducting certain specified percentages from rates and tolls in respect to the carriage of certain commodities as now charged or as contained in the present freight tariff of the company, whichever rates are the lowest; clause (*e*) by deducting from the present rates on eastbound grain and flour 3 cents per one hundred pounds. It is obvious that the rates and tolls to be reduced whether those actually charged, or those contained in the freight tariff, were rates and tolls between points actually on the Canadian Pacific Railway as then existing. There were—there could be—no rates or tolls in existence to or from points not then on the system; and there could be no reductions in non-existing rates and tolls. Counsel for the appellants, therefore, very properly conceded that if question 2 were confined strictly to a construction of the Crowsnest Pass Act and Agreement he could not hope to succeed on this branch of the case. He asked, however, to be allowed to treat the question as if the Board had also asked the court to answer its several sub-interrogatories (*a*), (*b*), (*c*) and (*d*) having regard to the anti-discrimination sections of the Railway Act. Counsel for the railway companies acquiescing, the court acceded to this suggestion believing it to be in the public interest that the whole question as intended to be submitted and discussed should be dealt with.

It should also, perhaps, be observed that no disposition of this question having been made by the order appealed from, it may be doubtful whether it is strictly a proper subject-matter of appeal under section 52 (3). But it was before the Board on the applications of the appellants; it must necessarily be dealt with in view of the conclusion at which we have arrived as to question No. 1; and, if not properly submitted as a subject of appeal under section 52 (3), it was quite open to the Board to submit it in the form of a stated case under section 43. We, therefore, think it should be answered regardless of the form in which it has been presented to us.

For the reasons fully stated in disposing of the first question we are of the opinion, after giving full consideration to the anti-discrimination sections of the Railway Act, that the provisions of the Special Act and Agreement must prevail and that effect must be given to the plain and unmistakable terms in which clauses (*d*) and (*e*) are couched notwithstanding any discrimination, inequality or unfairness that may ensue. It is quite within the power of Parliament to provide that on certain lines of railway rates and charges in respect of certain traffic shall not exceed stated amounts regardless of any discriminatory effect which the making of such rates and charges may produce. Such provisions are made in the Crowsnest Pass Act of 1897 and in the two Acts of 1903 and 1908 above quoted. When such maxima are fixed by Special Acts they must be regarded as exceptions intentionally made by Parliament from the application of its general policy against discrimination. Section 5 of the Railway Act, 1903, and section 3 of the Railway Act, 1919, apply quite as fully and quite as effectively to the anti-discrimination sections of those respective statutes as they do to the equally general provisions ordaining the control and supervision of tariffs by the Board of Railway Commissioners.

The alleged fact that, if applied to the limited extent for which clauses (*d*) and (*e*) distinctly provide, the maintenance of the Crowsnest Pass rates will produce discrimination and inequality which would ordinarily be in clear violation of the anti-discrimination sections of the Railway Act would not justify an exclusion of their application such as the appellants press for. Discriminations so authorized by Parliament itself cannot be regarded as unjust or prohibited.

We, therefore, think it clear that the application of the Crowsnest Pass rates is confined to traffic between points which were on the Canadian Pacific Railway in 1897.

We answer the series of questions submitted as follows:—

Question No. 1: No.

Question No. 2:

(*a*): Part one: No.
Part two: Yes.

(*b*) In order that the traffic provided for by clause (*d*) should fall under that clause it must originate at Fort William or some point east thereof which at the date of the agreement was "on the company's railway";

(*c*) In order that the rates prescribed in clause (*d*) should apply the destination of traffic otherwise within that clause must be a point which was, at the date of the agreement, "on the company's main line or on (some) line of railway throughout Canada owned or leased by or operated on account of the company";

(*d*) Yes.

Question No. 3: No.

There remains to be noted a point raised by counsel for the provinces of Nova Scotia and New Brunswick, namely, that the Canadian Pacific Railway Company had in the tariffs disallowed by the order of the 14th of October fixed Megantic, in the province of Quebec, as the most easterly point to which it applied the Crowsnest rates, whereas, it is contended, those rates should be extended to the port of St. John, in the province of New Brunswick, the eastern-most point on the Canadian Pacific Railway as it existed in 1897. Of this matter it need only be said that it does not fall within the scope of the questions of law and jurisdiction submitted, and, as indicated in the opinion of the learned Chief Commissioner, it would appear to be one of "the other and manifold subjects remaining for consideration after the settlement of the main question" and "undetermined by the present decision of the Board" (Case p. 43). It is not before the court on the present appeal.

In appeals from the Board of Railway Commissioners the functions of the Supreme Court are very circumscribed. When it has declared and certified the law as it finds it and has accordingly allowed or disallowed the appeal for which leave is given (Can. Pac. Ry. Co. v. Toronto et al, 1911, A.C. 461, 471-2), those functions are exhausted. However grave, however disastrous the consequences, the court is powerless to afford a remedy. The Board of Railway Commissioners in its turn can only apply and administer the law as it exists. If, under the existing law, unreasonable rates must be imposed or unfair discrimination sanctioned, with the resulting chaos and other ill effects so graphically portrayed in the opinion of Mr. Commissioner Boyce, the remedy lies with the High Court of Parliament. By amending the existing law, it may either itself do, or may empower and require its delegate, the Board, to do as full and complete justice as circumstances admit. Fortunately Parliament is presently in session. Whatever remedy, if any, it may in its discretion consider necessary or desirable can be speedily afforded.

The appeal will be allowed to the extent indicated, but in view of the divided success, without costs.